73-6878.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-6878

ALBERT CROWDER, JR.,

Petitioner,

-v.-

STATE OF NORTH CAROLINA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF NORTH CAROLINA

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INDEX

	Page
Citation to Opinions Below	1
Jurisdiction	1
Questions Presented	2
Constitutional and Statutory Provisions Involved ...	2
Statement	3
How the Federal Questions Were Raised and Decided Below	9
Reasons for Granting the Writ	
I. The Court Should Grant Certiorari To Consider Whether the Imposition and Carrying Out of the Sentence of Death for the Crime of Murder Under the Law of North Carolina Violates the Eighth or Fourteenth Amendment to the Constitution of the United States	11
II. The Court Should Grant Certiorari To Consider Whether Petitioner Was Denied Due Process of Law by the Calculated Prosecutorial Misconduct of Eliciting from a Prosecution Witness Manifestly Inadmissible and Prejudicial Testimony that Petitioner Had Met the Deceased "In Prison"; and Whether this Misconduct in a Jury Trial Can Be Cured by a Judicial Admonition that the Jury "Not Consider the Answer to that Question," "As to the Fact that [the] Witness Has Testified that Peggy [the Deceased] Met Him in Caledonia prison"..	13
Conclusion	19

TABLE OF CASES

	Page
Baldwin v. New York, 399 U.S. 66 (1970)	15
Berger v. United States, 295 U.S. 78 (1935)	17
Brady v. Maryland, 373 U.S. 83 (1963)	16
Bruton v. United States, 391 U.S. 123 (1968).....	14,18
Dillard v. North Carolina, No. 73- (O.T.1973, filed June 11, 1974)	11
Duncan v. Louisiana, 391 U.S. 145 (1968)	15
Ferguson v. Georgia, 365 U.S. 570 (1961).....	15
Furman v. Georgia, 408 U.S. 238 (1972).....	9,11
Jackson v. Denno, 378 U.S. 368 (1964).....	14
Kyle v. United States, 297 F.2d 507 (CA2 1961).....	14
Lovely v. United States, 169 F.2d 386 (CA4 1948).....	15,16,17
Lutwak v. United States, 344 U.S. 604 (1953).....	17
Marshall v.United States, 360 U.S. 310 (1959).....	18
Michelson v. United States, 335 U.S. 469 (1948).....	15
Mooney v. Holohan, 294 U.S. 103 (1935).....	16
Schneckloth v. Bustamonte, 412 U.S. 218 (1973).....	15
State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721 (1974)	9,10
State v. Kahinu, 53 Hawaii 536, 498 P.2d 635 (1972)..	16
State v. Waddell, 282 N.C. 431, 194 S.E.2d 19(1973)...	2,3,9
United States v. Beno, 324 F.2d 582 (CA2 1963).....	15,18
United States ex rel. Scoleri v. Banmiller, 310 F.2d 720 (CA3 1962).....	17

STATUTES

	Page
Federal:	
28 U.S.C. §1257(3)	1
State:	
N.C. Gen. Stat. §14-17	2,3
N.C. Gen. Stat. §15-187	3
N.C. Gen. Stat. §15-188	3
S.B. 157, Chap. 1201, 1973 Sess. (2nd Sess. 1974) (April 8, 1974)	3

OTHER AUTHORITIES

Wigmore, On Evidence, §57 (3 ed. 1940)	15

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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of North Carolina entered on March 13, 1974.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of North Carolina is reported at 285 N.C. 42, 203 S.E.2d 38 (1974) and is set out in Appendix A hereto, pp. 1a-9a, infra.

JURISDICTION

The judgment of the Supreme Court of the State of North Carolina was entered on March 13, 1974 and is set out in Appendix A hereto. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether the imposition and carrying out of the sentence of death for the crime of murder under the law of North Carolina violates the Eighth or Fourteenth Amendment to the Constitution of the United States?

2. Whether petitioner was denied Due Process of Law by the calculated prosecutorial misconduct of eliciting from a prosecution witness manifestly inadmissible and prejudicial testimony that petitioner had met the deceased "in prison"; and whether this misconduct in a jury trial can be cured by a judicial admonition that the jury "not consider the answer to that question, "as to the fact that [the] witness has testified that Peggy [the deceased] met him in Caledonia prison?"

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of the General Statutes of North Carolina:

> § 14-17. Murder in the first and second degree defined; punishment.- A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death: Provided, if at the time of rendering its verdict in open court, the jury shall so recommend the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury. All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the State's prison. 1/

1/ As construed in State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973).

§ 15-187. Death by administration of lethal gas.- Death by electrocution under sentence of law is hereby abolished and death by the administration of lethal gas substituted therefor.

§ 15-188. Manner and place of execution.- The mode of executing a death sentence must in every case be by causing the convict or felon to inhale lethal gas of sufficient quantity to cause death, and the administration of such lethal gas must be continued until such convict or felon is dead; and when any person, convict or felon shall be sentenced by any court of the State having competent jurisdiction to be so executed, such punishment shall only be inflicted within a permanent death chamber which the superintendent of the State penitentiary is hereby authorized and directed to provide within the walls of the North Carolina penitentiary at Raleigh, North Carolina. The superintendent of the State penitentiary shall also cause to be provided, in conformity with this article and approved by the Governor and Council of State, the necessary appliances for the infliction of the punishment of death in accordance with the requirements of this article.

STATEMENT

This is a petition for a writ of certiorari to review the judgment of the Supreme Court of North Carolina, entered on March 13, 1974, affirming petitioner's conviction and death sentence. Petitioner, Albert Crowder, Jr., a black man, was sentenced to die on July 18, 1973 in the Wake County Superior Court of North Carolina upon conviction for the first degree murder of an acquaintance, Miss Peggy Bryant. 2/

2/ Petitioner's sentence of death was imposed under N.C. Gen. Stat. §14-17, as construed by the Supreme Court of North Carolina in State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973). The North Carolina Legislature enacted a statute, S.B. 157, Chap. 1201, 1973 Sess. (2nd Sess. 1974) on April 8, 1974 which imposes the death penalty for first degree murder, but this statute was enacted subsequent to the decision of the North Carolina Supreme Court in petitioner's case and provides that it is applicable to offenses committed after its ratification.

The State's evidence showed that Miss Bryant's body was found lying in the parking lot of the King's Lounge in Raleigh, North Carolina, at 11:10 p.m., March 4, 1973, bleeding profusely from a gunshot wound in the head. Officer A.C. Holt of the Raleigh Police Department testified that when he discovered the body, petitioner, who appeared "excited," R. 13, was bending over it, and a crowd of thirty to forty people had gathered. Miss Bryant was transported to a hospital and was pronounced dead a short time later. A subsequent autopsy revealed that she had died from a gunshot wound in the head.

The chief witness against petitioner was one Milton Hunter who was outside the King's Lounge drinking beer about 10:00 p.m. on March 4, 1973. Mr. Hunter testified that he saw Miss Bryant get out of a car and come over to talk to petitioner. He testified that:

> "[Petitioner] told her, says, 'I got something to tell you and something for you, too.' And she [Miss Bryant] said, 'What is it?' And bam, just like that and that is it. And then he went to hitting against the hood of the other car where [sic] was next to my car . . . . He says 'Call the ambulance. Call the ambulance. Someone from the highway over there shot my girl friend. Call the ambulance.'"3/ R. 15.

3/ The details of the shooting were narrated differently by this witness on other occasions. On redirect examination the next day, the witness testified that petitioner had said to Miss Bryant before he shot her: "You black assed mother fucker, I got something for you . . . . I have got your god damn birthday present right here . . . This .38 here." R.31. On both direct and redirect examination, Hunter testified that he could clearly see petitioner shoot Miss Bryant. The police had taken two statements from this witness shortly after the crime, and Officer R.D. Williams of the Raleigh Police Department testified that at 2:00 a.m., March 5, 1973, he had taken a statement by hand, in which the witness said, "The girl turned around and started back toward [petitioner] when I heard a shot fired. I looked around the corner and the girl was lying on the ground

After the shooting, Mr. Hunter "went over there to catch hold of him. He was beating on the car. He acted like he was crazy." R.16. One Bruce McNeil, who was not called to testify, grabbed the witness and told him that he, McNeil, could "handle" petitioner. R. 31.

Four young women who accompanied Miss Bryant on the night of the shooting 4/ described the events surrounding it.

3/ cont'd.

bleeding from the forehead." R. 54-55. In a statement taken in the afternoon of that day, which Officer Williams had typed from his notes, the witness was quoted as saying that he actually saw petitioner shoot Miss Bryant. R. 56. Officer Williams testified that Hunter "informed [me] that the defendant called the deceased in the manner of, 'Come here. I have got something for you.' The deceased replied, 'What?' and he stated a bullet and fired." R. 51. It is not clear from the record which statement of the witness Officer Williams based this account on.

4/ Miss Velvet Dew (16 years old), R. 37-39; Miss Deborah Bryant (16 years old, the deceased's sister), R. 39-42; Miss Jacquelyn Otelie Bryant (14 years old, the deceased's sister), R. 42-46; Miss Devonna Lewis (19 years old), R. 46-47.

The five women had driven to the King's Lounge in Miss Bryant's car. When they arrived, Miss Bryant went into the nearby Kwik-Pik Store. She came out and had a brief conversation with petitioner,[5/] and he called her around the corner of the King's Lounge, where they continued talking. None of the four women overheard this conversation. Miss Bryant rejoined the other women, and petitioner went into the Lounge. He came out a short time later, called Miss Bryant again, and they had another brief talk, out of the sight and hearing of the four other women, who suddenly heard a shot, and saw petitioner come from the side of the building. Velvet Dew testified that he "came out talking about getting an ambulance," but that when she attempted to call one from a nearby pay phone, Bruce McNeil took the phone away from her. R. 37. Deborah Bryant said that petitioner came up to her just after the gunshot and "said to call the police and ambulance cause somebody over there [across the street] had shot my sister," R. 42. She also testified that

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5/ Jacquelyn Otelie Bryant testified that the deceased initiated this contact with petitioner, by sending Deborah Bryant to him with the message that she wanted to see him. She also reported that the two had had a brief quarrel near the car: "He told her to kiss his ass. She told him to kiss hers." R. 43. She reported that this occurred before the first of the two times that the deceased and petitioner went around the corner of the Lounge.

a few hours later at the hospital, petitioner had said to her "somebody right around the corner in a car shot your sister and I believe it was meant for me." R. 42. There was testimony that petitioner and Miss Peggy Bryant had previously been "dating." R. 38.

The police searched the parking lot just after the shooting and did not discover any evidence. A search conducted about an hour and a half later disclosed a .38 caliber five-shot revolver, with four cartridges and one spent cartridge in its chambers, on the pavement about twenty feet from where Miss Bryant's body was found. Milton Hunter testified that when the police showed him this pistol that evening, it was "like" the one he had seen in petitioner's possession earlier. R. 16, 17. Deborah Bryant testified that about a week before the shooting, she had seen petitioner with a pistol "similar" to the one the police found at the crime scene. R. 40. After petitioner was taken into custody about two hours following the shooting, North Carolina Special Bureau of Investigation Agent Lee Sampson swabbed his hands with a dilute hydrochloric acid solution, and a subsequent SBI flameless atomic absorption spectrophotometry test disclosed significant concentrations of barium, antimony, and lead on the back of petitioner's right hand and on the palm of his left hand. SBI chemist R. D. Cone testified that in his opinion petitioner "could have handled and fired a gun" earlier in the evening. R. 72. Two metal fragments found in Miss Bryant's brain were too splintered to be subjected to ballistics tests.

Stains on petitioner's shoes and trousers were determined to be Group A human blood. There was evidence that Miss Bryant's blood was Group A.

At petitioner's trial, the prosecutor examined prosecution witness Jacquelyn Otelie Bryant and asked her, over objection, where petitioner had met her sister, Peggy. The witness replied, "She met him in Caledonia in prison." R. 44. A motion to strike this response was granted, and petitioner's counsel then had the jury cleared and moved for a mistrial, arguing that the prosecutor was guilty of intentional misconduct. R. 44. The court denied the motion, ruling that the testimony had already been stricken and that the witness' answer was not clearly prejudicial, since she had not said that petitioner was himself in Caledonia prison. R. 44-45.

At the conclusion of the testimony, the court instructed the jury that it could return a verdict of not guilty, guilty of second degree murder, or guilty of first degree murder. The court further charged that "the punishment is not for the jury . . . . The punishment, if any, is not within the province of the jury." R. 100. The jury found petitioner guilty of first degree murder, and the court thereupon sentenced him to die.

On March 13, 1974, the Supreme Court of North Carolina affirmed petitioner's conviction and sentence of death, with three Justices dissenting in regard to the death penalty. On March 19, 1974, Chief Justice William A. Bobbitt of the North Carolina Supreme Court stayed execution of the judgment in order to allow a petition for certiorari to be filed in this Court.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

I. Petitioner's Grouping of Exceptions and Assignments of Error (R. 108-119) in the Record on Appeal in the North Carolina Supreme Court assigned as error the death sentence in this case because that "judgment was cruel and unusual punishment and prohibited by the Eighth Amendment to the Constitution of the United States [,] . . . . denied the defendant Equal Protection of the Law [and] . . . . denied defendant due process of law as guaranteed to him by the Fourteenth Amendment to the Constitution of the United States." (Assignment of Error No. 17, R. 118-119). Petitioner's Brief in the North Carolina Supreme Court argued this claim, Brief of Appellant at 26-108, contending more particularly that:

> "A. The Death Penalty is Unauthorized by any Constitutionally Valid Statute of the State of North Carolina" (Brief of Appellant at 26-35)
>
> "B. Despite this Court's Decision in STATE v. WADDELL, 282 NC 431, 194 SE 2d (1973), Capital Punishment in North Carolina is Still Imposed in a Selective and Arbitrary Manner that Violates the Rule of FURMAN v GEORGIA, 408 US 238 (1972)" (Ibid. at 35-62)
>
> "C. The Penalty of Death, Imposed Pursuant to a Post-WADDELL Capital Conviction, Constitutes Cruel and Unusual Punishment Prohibited by the Eighth and Fourteenth Amendments to the United States Constitution Because Enlightened Public Opinion Has Overwhelmingly Repudiated the Death Penalty" (Ibid. at 63-88)
>
> "D. Regardless of the Procedural System Under Which it is Inflicted, the Imposition of Capital Punishment is Excessively and Unnecessarily Cruel in Light of Contemporary Standards of Decency and Dignity Enshrined in the Eighth Amendment" (Ibid. at 88-108)

The Court rejected this argument, citing its decisions in State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973) and State v.

Jarrette, 284 N.C. 625, 202 S.E.2d 721 (1974): the "[death] penalty is neither cruel nor inhuman in a constitutional sense." 203 S.E.2d at 47 (App.A. at 9a).[6/]

II. Petitioner's counsel immediately objected to prosecution witness Jacquelyn Otelie Bryant's statement that Peggy "met him in Caledonia in prison" and moved for a mistrial on the ground that the prosecutor "knew where [petitioner] was" and that the prosecutor's action was therefore "very prejudicial to the [petitioner] and totally uncalled for." R. 44. Petitioner's Grouping of Exceptions and Assignments of Error, R. 108-119, in the Record on Appeal in the North Carolina Supreme Court assigned as error the court's permitting the prosecutor's question because it "prevented defendant from receiving a fair trial " (Assignment of Error No. 3, R. 110), and the court's denial of his mistrial motion, made because the testimony "was so prejudicial that it could not be cured by the Court's admonition to the jury to disregard it " (Assignment of Error No. 4, R. 110-111). Petitioner's Brief in the North Carolina Supreme Court argued this claim. Brief of Appellant at 7-10. The Court rejected this contention: "This evidence . . . may not be deemed so inherently prejudicial that its initial impact could not be erased by the judge's prompt instruction." 203 S.E.2d at 43 (App.A at 6a).

6/ A dissenting opinion stated: "BOBBITT, C.J., and HIGGINS and SHARP, JJ., dissent as to death sentence and vote to remand for imposition of a sentence of life imprisonment for the reasons stated in the dissenting opinion of Chief Justice Bobbitt in State v. Jarrette, N.C. 202 S.E.2d 721 (1974)." 203 S.E.2d at 47 (App.A at 9a).

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF MURDER UNDER THE LAW OF NORTH CAROLINA VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

In order to avoid burdening the Court with lengthy and repetitious matter, petitioner adopts the "Reasons for Granting the Writ" section of the Petition for Certiorari to the Supreme Court of North Carolina, Dillard v. North Carolina, No. 73- (O.T. 1973, filed June 11, 1974), at pp. 11-51, and each of the issues set forth there:

(A) Whether the decision of the North Carolina Supreme Court reinstating the death penalty in that State following Furman v. Georgia, 408 U.S. 238 (1972), is an impermissible evasion of the Furman holding;

(B) Whether such a reinstatement of the death penalty by judicial decision violates the Eighth and Fourteenth Amendment commands of lawfulness in criminal punishments;

(C) Whether the perpetuation of arbitrary sentencing discretion in North Carolina's administration of the death penalty following Furman violates the constitutional rule of that case;

(D) Whether the death penalty is so inconsistent with contemporary standards of decency as to violate the Eighth and Fourteenth Amendments.

II. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER PETITIONER WAS DENIED DUE PROCESS OF LAW BY THE CALCULATED PROSECUTORIAL MISCONDUCT OF ELICITING FROM A PROSECUTION WITNESS MANIFESTLY INADMISSIBLE AND PREJUDICIAL TESTIMONY THAT PETITIONER HAD MET THE DECEASED "IN PRISON"; AND WHETHER THIS MISCONDUCT IN A JURY TRIAL CAN BE CURED BY A JUDICIAL ADMONITION THAT THE JURY "NOT CONSIDER THE ANSWER TO THAT QUESTION" "AS TO THE FACT THAT [THE] WITNESS HAS TESTIFIED THAT PEGGY [THE DECEASED] MET HIM IN CALEDONIA PRISON".

During the direct examination of prosecution witness Jacquelyn Otelie Bryant, the following exchange occurred:

> Q. [The Solicitor] Do you know of your own knowledge where they met?
> A. Yes, she had met him at --
> MR. BASS [Counsel for Petitioner] Objection.
> COURT: Overruled.
> A. She met him in Caledonia in prison.
> MR. BASS: Objection and motion to strike.
> COURT: Well, sustained. Motion allowed as to the fact that the witness had testified that Peggy met him in Caledonia prison. Ladies and gentlemen of the jury, do not consider the answer to that question.

R. 44. Counsel for petitioner then had the jury removed and made a motion for a mistrial:

> Your Honor, based upon that last question, which obviously the Solicitor knew the answer to -- the defendant hasn't taken the stand -- drew out of the witness a question to the fact that a man was in prison, Caledonia prison. I think we have ample ground for mistrial in this case. Now, I know Mr. Mitchell [the Solicitor] knew where he was and the question could only have been asked to solicit one thing and we can strike from the jury's mind all you want to, but then he was in the prison at the time he met her. I think it is very prejudicial to the man and totally uncalled for.

R. 44. The trial judge denied this motion on the ground that

the witness had not stated that petitioner was himself incarcerated in Caledonia prison when he met Peggy Bryant. R. 44.

Denial of petitioner's mistrial motion following this incident at a capital trial where petitioner was subsequently convicted and sentenced to die raises the substantial and important Due Process questions whether an error of this sort is so prejudicial as to be beyond cure by cautionary instructions, Bruton v. United States, 391 U.S. 123, 135 (1968); cf. Jackson v. Denno, 378 U.S. 368, 388-389 (1964); and whether the standard of prejudice is different in cases of plain, calculated prosecutorial misconduct than in cases where prosecutorial error is negligent or unintentional. See Kyle v. United States, 297 F. 2d 507, 513-515 (CA2 1961).

The evidence which the prosecutor sought to introduce here was of a particularly prejudicial kind. As this Court has noted:

> "Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt.[7/] Not that the law invests the defendant with a presumption of good character . . . but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted

7/ This unanimity of modern Anglo-American opinion is relevant for Due Process purposes on two accounts. First, it embodies a recognition of the fundamental nature of the rule precluding

> probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."

Michelson v. United States, 335 U.S. 469, 475-476 (1948)(footnotes omitted).[8] This rule reflects "one of the most fundamental notions known to our law -- that a man is entitled to be tried only for specific charges explicity stated, and should not be compelled to defend a lifetime of conduct." United States v. Beno, 324 F.2d 582, 587 (CA2 1963).[9] The origin of this prohibition, Wigmore notes, is "[t]he deep tendency of human nature to punish, not because our victim is guilty this time, but because he is a bad man and may as well be condemned now that he is caught." Wigmore, On Evidence §57 (3ed. 1940).

> "'The general rule of evidence applicable to criminal trials is that the state cannot prove against a defendant any crime not alleged in the indictment, either as a foundation for a separate punishment, or as aiding the proofs that he is

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7/ cont'd.

prejudicial evidence of this sort. See Ferguson v. Georgia, 365 U.S. 570, 594-596 (1961); Baldwin v. New York, 399 U.S. 66, 72-73 (1970). Second, this unanimity of opinion recognizes the importance of the rule in "the context of the criminal processes maintained by the American States," Duncan v. Louisiana, 391 U.S. 145, 150 n. 14 (1968) -- the "actual systems" of criminal procedure, id. at 149 n. 14, upon which American courts rely to "protect a fair criminal trial." Schneckloth v. Bustamonte, 412 U.S. 218, 241 (1973).

8/ "The rule . . . firmly and universally established in policy and tradition, is that the prosecution may not initially attack the defendant's character." Wigmore, On Evidence §57 (3ed.1940).

9/ Cf. Lovely v. United States, 169 F.2d 386, 389 (CA4 1948): "The rule which . . . forbids the introduction of evidence of other offenses having no reasonable tendency to prove the crime charged, except in so far as they may establish a criminal tendency on the part of the accused, is not a mere technical rule of law. It arises out of the fundamental demand for justice and fairness which lies at the basis of our jurisprudence."

> guilty of the crime charged . . . . This rule, so universally recognized and so firmly established in all English-speaking lands, is rooted in that jealous regard for the liberty of the individual which has distinguished our jurisprudence from all others, at least from the birth of the Magna Charta. It is the product of that same humane and enlightened public spirit which, speaking through our common law, has decreed that every person charged with the commission of a crime shall be protected by the presumption of innocence until he has been proved guilty beyond a reasonable doubt. This rule, and the reasons upon which it rests, are . . . familiar to every student of our law." (Lovely v. United States, 169 F.2d 386, 389 (CA4 1948).)

With increasing frequency, courts have expressed concern about the problem of prosecution witnesses -- especially policemen -- blurting out "prejudicial remarks, usually relating to a defendant's criminal record." State v. Kahinu, 53 Hawaii 536, 498 P. 2d 635, 643-644 (1972).

Here the introduction of testimony that petitioner had a prison record was not the result of negligence or good faith error, or even the misguided zeal of a police witness, whose conduct might perhaps be judged by a less exacting standard than that which constrains an officer of the court, but was rather a "'result of guile'", Brady v. Maryland, 373 U.S. 83, 88 (1963). The question was phrased in such a way that its prejudicial nature was not apparent until the witness answered, a response promptly ruled inadmissible by the trial court. This incident was "a contrivance by a State [prosecutor] to procure . . . conviction." Mooney v. Holohan, 294 U.S. 103, 112 (1935). It is thus a violation of the fundamental fairness guaranteed

by the Due Process Clause, for the prosecutor

> "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones." (Berger v. United States, 295 U.S. 78, 88 (1935).)

The plain intent of this prosecutorial gambit was to "show . . . that [petitioner] was a bad man, likely to commit . . . crime." Lovely v. United States, 169 F.2d 386, 388 (CA4 1948).

Given the nature of the witness' answer, curative instructions were not adequate to erase the prejudicial testimony from the jurors' minds, particularly when the trial court repeated the witness' answer in its cautionary instruction. This was a "situation . . . which called for stern rebuke and repressive measures." Berger v. United States, supra, at 85. The prejudicial effect of the introduction of testimony concerning defendant's prison record in a capital trial is extremely great: "The danger resulting from prejudice is always enhanced in a capital trial: passions run high, and the penalty is irreversible." United States ex rel. Scoleri v. Banmiller, 310 F.2d 720, 724 (CA3 1962). Although, of course,"[a] defendant is entitled to a fair trial but not a perfect one," Lutwak v. United States, 344 U.S. 604, 619 (1953), "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the

defendant that the practical limitations of the jury system cannot be ignored." Bruton v. United States, 391 U.S. 123, 135 (1968).[10/] Since the error here was the result of intentional prosecutorial misconduct, the necessity to show prejudice should be satisfied by the inherently damaging nature of the information presented to the jury. The State "should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds." Bruton v. United States, supra, at 129. In the context of this particular trial, the curative instructions given were insufficient to erase the fundamentally unfair effects of this prosecutorial tactic. See Marshall v. United States, 360 U.S. 310 (1959).

10/ "By attempting to show that [defendant] was the sort of man likely to be a perpetrator of crime the prosecutor denied him fair opportunity to defend against the particular crime charged, for this sort of evidence weighs too heavily with the jury and makes impossible the dispassionate approach necessary if justice is to be achieved." United States v. Beno, 324 F.2d 582, 587 (CA2 1963).

CONCLUSION

Petitioner prays that the petition for a writ of certiorari be granted.

RESPECTFULLY SUBMITTED,

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APPENDIX A

Opinion of the Court Below

defendant filed no petition for certiorari for a review thereof by this Court. Suffice to say, defendant's non-constitutional assignments of error do not disclose sufficient merit to warrant further appellate review by this Court. See State v. Colson, 274 N.C. 295, 305, 163 S.E.2d 376, 383 (1968).

The decision of the North Carolina Court of Appeals is affirmed.

Affirmed.

STATE of North Carolina

v.

Albert CROWDER, Jr.

No. 7.

Supreme Court of North Carolina.

March 13, 1974.

Defendant was convicted in the Superior Court, Wake County, Perry W. Martin, J., of murder in first degree and he was sentenced to death and he appealed. The Supreme Court, Huskins, J., held that where police officer identified State's exhibit as pistol he found on parking lot four to six parking spaces from spot where deceased was shot, eyewitness to shooting testified that defendant told deceased he had "a .38" for her just before the shot was fired and that the exhibit resembled gun he saw defendant use, the pistol was properly admitted; that evidence of result of using flameless atomic absorption spectrophotometry to determine whether defendant had fired a gun was admissible, even though it did not exclude every remote possibility of error, and that penalty for murder in first degree committed after 18 January 1973 is death and such penalty is neither cruel nor inhuman in constitutional sense.

No error.

Bobbitt, C. J., and Higgins and Sharp, JJ., dissented as to death sentence.

1. Jury ⇐103

Veniremen may not be challenged for cause in capital case simply because they voice general objections to death penalty or express conscientious or religious scruples against its infliction.

2. Jury ⇐103

Veniremen who are unwilling to consider all penalties provided by law and who are irrevocably committed before trial of capital case has begun, to vote against death penalty regardless of facts and circumstances that might emerge in course of trial may be challenged for cause on that ground.

3. Jury ⇐131(9)

It is proper in capital case for both state and defendant to make appropriate inquiry concerning prospective juror's moral or religious scruples, beliefs, and attitudes towards capital punishment.

4. Jury ⇐131(9)

Solicitor was properly permitted to ask each prospective juror whether he had any moral or religious scruples or beliefs against capital punishment.

5. Criminal Law ⇐404(3)

Generally, weapons may be admitted in evidence where there is evidence tending to show that they were used in commission of a crime.

6. Criminal Law ⇐404(3)

Any article shown by evidence to have been used in connection with commission of crime charged is competent and properly admitted into evidence.

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riminal Law C=404(3)

Any article shown by evidence to have used in connection with commission rime charged is competent and proper- dmitted into evidence.

7. Criminal Law C=404(3)

Where police officer identified State's exhibit as pistol he found on parking lot four to six parking spaces from spot where deceased was shot, eyewitness to shooting testified that defendant told deceased he had "a .38" for her just before the shot was fired and the exhibit resembled gun he saw defendant use and another witness testified that she had seen defendant with the pistol similar to the exhibit, the pistol was properly admitted in murder case.

8. Criminal Law C=1169.5(1)

Ordinarily, where objectionable evidence is withdrawn and jury instructed not to consider it, no error is committed.

9. Criminal Law C=1169.5(1)

In appraising effect of incompetent evidence, once admitted and afterwards withdrawn, court will look to nature of evidence and its probable influence upon minds of jurors in reaching verdict.

10. Criminal Law C=1169.5(3)

Testimony that defendant had met deceased in prison, a matter not mentioned again, was not so inherently prejudicial that its initial impact could not be erased by judge's prompt instruction not to consider answer to the question; thus prejudicial effect, if any, was removed.

11. Criminal Law C=1169.11

Even if witness' statement that defendant had met alleged murder victim in prison had been prejudicial, where properly admitted evidence of guilt was overwhelming, prejudicial effect of statement, which was stricken, was so insignificant that it was harmless beyond a reasonable doubt.

12. Criminal Law C=438(1)

Photographs are admissible to illustrate testimony of witness and their admission for that purpose under proper limiting instructions is not error.

13. Criminal Law C=438(7)

Fact that photograph may depict a horrible, gruesome or revolting scene, indicating a vicious, calculated act of cruelty, malice or lust, does not render it incompetent and when photograph is properly authenticated as correct portrayal of conditions observed and related by witness who uses it to illustrate his testimony, it is admissible for that purpose.

14. Criminal Law C=438(9)

Photograph of nude body of deceased taken in morgue was admissible to illustrate testimony of officer of city county identification bureau, over objections that it was inflammatory and prejudicial.

15. Criminal Law C=474(1)

Where special agent with State Bureau of Investigation had two years of college training, had worked for Federal Bureau of Investigation in its fingerprint identification, had been agent with State Bureau for two years and five months at time he took gunshot wipings from gun, he had been personally instructed in procedures to be followed by the bureau's chemist and it was a relatively simple matter to take the wipings, evidence concerning the wipings was not inadmissible on theory that the agent who secured the wipings was not qualified to take them.

16. Criminal Law C=1169.1(10)

Where procedure which agent testified he followed in taking gunshot wipings and procedure contained in instruction sheet read to jury by State Bureau of Investigation chemist were essentially the same, defendant was not prejudiced by introduction of instruction sheet into evidence, whether or not the sheet was the sheet used by agent in taking the wipings from defendant's hands.

17. Criminal Law C=388

Evidence of result of using flameless atomic absorption spectrophotometry to determine whether defendant had fired a gun

was admissible in murder case even though the evidence did not exclude every remote possibility of error.

18. Criminal Law ⇨1213

Penalty for murder in first degree committed after 18 January 1973 is death and that penalty is neither cruel nor inhuman in constitutional sense. U.S.C.A. Const. Amends. 8, 14.

Defendant was tried upon a bill of indictment, proper in form, charging that on 4 March 1973, with malice aforethought, he did kill and murder Peggy Ann Bryant.

The State offered evidence tending to show that on the night of 4 March 1973 defendant was at King's Lounge, a Raleigh tavern. The deceased Peggy Ann Bryant, defendant's girl friend, arrived in an auto with her two sisters and two other girls. Peggy called defendant to the car where an argument ensued following which defendant went back into the tavern. Shortly thereafter defendant came out of King's Lounge, called Peggy, and they went around the corner of the building. They returned in a few minutes and defendant reentered the lounge while Peggy talked to the other girls at the car in the parking lot. When defendant came out of King's Lounge the second time, Peggy left the car and again followed defendant to the side of the tavern. What then occurred is described by Milton Hunter, an eyewitness, in the following paragraph:

Hunter had parked his car in a parking space at the corner of King's Lounge and thus could see down two sides of the building and was seated on the hood of his car drinking beer and talking with an acquaintance, a soldier named Edward Patterson. He observed defendant and Peggy Ann Bryant beside the building. He heard defendant call Peggy a vulgar name and say: "I got something for you, I have got your goddamn birthday present right here." Peggy said: "What is it?" Defendant replied: "This .38 here." According to witness Hunter, the pistol was not in defendant's hand at the time. "He reached up this way and got up beside of his stomach and got it." Defendant then shot Peggy Ann Bryant in the face, began hitting the hood of the car next to Hunter's car and yelled for an ambulance, saying "some one from the highway over there shot my girl friend." Peggy Ann Bryant was taken by ambulance to the hospital where she died as a result of extensive injury to the brain caused by a bullet which had entered directly above the left eye and penetrated the brain. An autopsy was performed and two lead fragments lodged in the brain and the head were removed.

Numerous other witnesses testified that they saw Peggy Ann Bryant accompany the defendant to the side of the building and then heard a shot.

Officer Hinton testified that the deadly weapon was not immediately found but approximately an hour and a half later, after returning from the hospital, he made a thorough search of the parking lot and found a .38 caliber Smith and Wesson revolver with a two-inch barrel approximately four to six parking spaces from where Peggy Ann Bryant was lying. The pistol was loaded at the time and contained four full rounds and one spent round.

Gunshot wipings taken from the back of defendant's right hand and the palm of his left hand showed significant concentrations of barium, antimony and lead particles on the back of the right hand between the thumb and forefinger. This indicated that he had recently fired a gun according to the testimony of R. D. Cone, a forensic chemist and an expert in the taking and interpretation of gunshot residue tests.

Glen Glesne, a laboratory analyst in the field of chemistry, blood and body fluids, did an analysis of the blood of Peggy Ann Bryant and determined that it belonged to Group A. Reddish colored stains on the shoes and trousers of defendant were analyzed and found to be blood of human ori-

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Defendant offered no evidence. The jury convicted defendant of murder in the first degree and he was sentenced to death. His appeal to this Court presents for review the assignments of error discussed in the opinion.

Robert Morgan, Atty. Gen., T. Buie Costen and Rafford E. Jones, Asst. Attys. Gen., Raleigh, for the State of North Carolina.

Gerald L. Bass, Raleigh, David E. Kendall of the NAACP Legal Defense Fund, New York City, for defendant-appellant.

HUSKINS, Justice:

Over defendant's objection the solicitor was permitted to ask each prospective juror the following question: "Do you have any moral or religious scruples or beliefs against capital punishment?" Ten jurors answered no, one answered yes but said that after hearing all the evidence and listening to the case she could consider a verdict of guilty in a capital case, and one said it would depend upon the circumstances. The record shows that no juror was excused for cause by either the solicitor or defense counsel. Defendant contends the trial court erred in allowing the jurors to be questioned concerning their views on capital punishment. This constitutes defendant's first assignment of error.

[1, 2] With respect to jury selections in capital cases, Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), establishes two things: (1) veniremen may not be challenged for cause simply because they voice general objections to the death penalty or express conscientious or religious scruples against its infliction; and (2) veniremen who are unwilling to consider all of the penalties provided by law and who are irrevocably committed, before the trial has begun, to vote against the death penalty regardless of the facts and circumstances that might emerge in the course of the trial may be challenged for cause on that ground.

Since the decision in *Witherspoon* this Court has held in many cases that prospective jurors in a capital case may be asked whether they have moral or religious scruples against capital punishment; if so, whether they are willing to consider all of the penalties provided by law, or are irrevocably committed to vote against the death penalty regardless of the facts and circumstances that might be revealed by the evidence. *See e. g.*, State v. Washington, 283 N.C. 175, 195 S.E.2d 534 (1973); State v. Frazier, 280 N.C. 181, 185 S.E.2d 682 (1972); State v. Doss, 279 N.C. 315, 183 S.E.2d 671 (1971); State v. Sanders, 279 N.C. 598, 184 S.E.2d 487 (1970); State v. Williams, 275 N.C. 77, 165 S.E.2d 481 (1969); State v. Peele, 274 N.C. 109, 161 S.E.2d 568 (1968).

[3, 4] In order to insure a fair trial before an unbiased jury, it is entirely proper in a capital case for both the State and the defendant to make appropriate inquiry concerning a prospective juror's moral or religious scruples, beliefs, and attitudes toward capital punishment. Defendant's first assignment of error is overruled.

A .38 Smith and Wesson pistol was identified as State's Exhibit 2 and admitted into evidence over defendant's objection. Defendant contends the pistol was improperly admitted since it was never identified as the murder weapon. This constitutes defendant's second assignment of error.

[5, 6] As a general rule weapons may be admitted in evidence "where there is evidence tending to show that they were used in the commission of a crime." State v. Wilson, 280 N.C. 674, 187 S.E.2d 22 (1972). Any article shown by the evidence to have been used in connection with the commission of the crime charged is competent and properly admitted into evidence. State v. Sneeden, 274 N.C. 498, 164 S.E.2d 190 (1968). "So far as the North Carolina

decisions go, any object which has a relevant connection with the case is admissible in evidence, in both civil and criminal trials. Thus, weapons may be admitted where there is evidence tending to show that they were used in the commission of a crime or in defense against an assault." 1 Stansbury's North Carolina Evidence § 118 (Brandis rev. 1973).

[7] Applying these legal principles to the evidence in this case, we hold that State's Exhibit 2 was properly admitted. Sergeant Hinton identified State's Exhibit 2 as the pistol he found in the parking lot at King's Lounge about one and one-half hours after the shooting. Officer Holder testified that the entire parking area was not searched immediately after the shooting due to crowd control problems and the large number of vehicles in the area. The pistol, which contained four full rounds and one empty cartridge, was found approximately four to six parking spaces from the spot where the deceased was shot. Milton Hunter, an eyewitness to the shooting, testified that defendant told deceased he had "a .38" for her just before the shot was fired, that he didn't see what happened to the gun afterwards; and that State's Exhibit 2 resembles the gun he saw defendant use. Deborah Bryant, when shown State's Exhibit 2, testified: "I have seen defendant Albert Crowder with a pistol before. It was similar to that one over at his house one night. It looked like that one to me. It was about a week before March 4." All this evidence tends to show a relevant connection between State's Exhibit 2 and the murder of Peggy Ann Bryant. The weapon was properly admitted. Defendant's second assignment of error is overruled.

Jacquelyn Otche Bryant, sister of the deceased, testified that defendant had been dating the deceased from July or August 1972 until the date she was shot. The solicitor then asked the witness if she knew of her own knowledge where defendant and deceased met. Defendant's objection to that question was overruled and the witness replied: "She met him in Caledonia in prison." Objection was then sustained and the jury was instructed not to consider the answer. At defendant's request the jury was excused and defendant moved for mistrial on the ground that the answer was so highly prejudicial the error could not be cured by the court's instructions. Denial of this motion constitutes defendant's third assignment of error.

Defendant relies on State v. Aycoth, 270 N.C. 270, 154 S.E.2d 59 (1967), in support of his motion for mistrial. There, Aycoth and his co-defendant John Shadrick were on trial for armed robbery. Deputy Sheriff Fowler was asked if he knew who owned the automobile which was in Aycoth's possession at the time of his arrest. The deputy replied that at the time Aycoth had been arrested on another charge he had said it was his car, and then added: "His wife asked me to go search the car and see if I could find some articles that was left in the car sitting in the yard *when he was indicted for murder.*" (Emphasis added.) Defendant's objection and motion to strike were allowed; and the court instructed the jury not to consider what defendant's wife had said. Defendant's motion for a mistrial was denied. This Court awarded a new trial, saying: "The unresponsive statement of Fowler informed the jury that Aycoth had been *indicted* for murder. . . . *Subsequent incidents* tend to emphasize rather than dispel the prejudicial effect of Fowler's testimony. Shadrick testified the arresting officer answered his inquiry as to why he was being arrested by saying, 'Running around with Aycoth is enough.' Too, the solicitor, in cross-examining Shadrick, asked (1) whether Shadrick had become acquainted with Aycoth in prison, and (2) whether Shadrick knew Aycoth while Shadrick was in prison. . . . Being of the opinion the incompetent evidence to the effect Aycoth had been or was under indictment for murder was of such serious nature that its prejudicial effect was not erased by the court's quoted instruction, we are constrained to hold that Aycoth's motion for a

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[8, 9] Ordinarily, where objectionable evidence is withdrawn and the jury instructed not to consider it no error is committed. State v. Davenport, 227 N.C. 475, 42 S.E.2d 685 (1947). The rule is aptly stated in State v. Strickland, 229 N.C. 261, 49 S.E.2d 462 (1948), as follows: "In appraising the effect of incompetent evidence [illegible] admitted and afterwards withdrawn, the Court will look to the nature of the evidence and its probable influence upon the minds of the jury in reaching a verdict. In some instances because of the serious character and gravity of the incompetent evidence and the obvious difficulty in erasing it from the mind, the court has held to the opinion that a subsequent withdrawal did not cure the error. But in other cases the trial courts have freely exercised the privilege, which is not only a matter of custom but almost a matter of necessity in the supervision of a lengthy trial. Ordinarily where the evidence is withdrawn no error is committed." (Citations omitted)

[10] It is readily apparent that substantial differences distinguish this case from *Aycoth.* In the latter, the objectionable statement was that Aycoth had been *indicted* for murder. Here, the statement was only that defendant had met deceased in Caledonia in prison. While the statement does suggest that defendant may have been in prison, it has other connotations as well: Who was in prison—defendant, deceased, or both? Furthermore, no *subsequent events* tended to emphasize this aspect of the matter. In fact, the subject was not mentioned again. This evidence, therefore, may not be deemed so inherently prejudicial that its initial impact could not be erased by the judge's prompt instruction: "Ladies and gentlemen of the jury, do not consider the answer to that question."

[11] "[O]ur system for the administration of justice through trial by jury is based upon the assumption that the trial jurors are men of character and sufficient intelligence to fully understand and comply with the instructions of the court, and are presumed to have done so." State v. Ray, 212 N.C. 725, 194 S.E. 482 (1938). We hold that the prejudicial effect, if any, of the evidence under discussion was removed when that evidence was withdrawn and the jury instructed not to consider it. This accords with recent decisions of this Court, including State v. Moore, 276 N.C. 142, 171 S.E.2d 453 (1970), and State v. Self, 280 N.C. 665, 187 S.E.2d 93 (1972). Moreover, the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the stricken evidence is so insignificant by comparison, that the occurrence complained of in this assignment was harmless beyond a reasonable doubt. Defendant's third assignment of error is overruled.

A photograph of the nude body of deceased taken in the morgue was admitted over objection to illustrate the testimony of Officer Holder of the City-County Identification Bureau. Defendant contends this photograph was inflammatory and prejudicial, and its admission constitutes his fourth assignment of error.

[12] Photographs are admissible in this State to illustrate the testimony of a witness, and their admission for that purpose under proper limiting instructions is not error. State v. Duncan, 282 N.C. 542, 193 S.E.2d 65 (1972); State v. Cutshall, 278 N.C. 334, 180 S.E.2d 745 (1971); State v. Atkinson, 278 N.C. 168, 179 S.E.2d 414 (1971); State v. Gardner, 228 N.C. 567, 46 S.E.2d 824 (1948). *See generally* 1 Stansbury's North Carolina Evidence § 34 (Brandis rev. 1973).

[13, 14] The fact that a photograph may depict a horrible, gruesome or revolting scene, indicating a vicious, calculated act of cruelty, malice or lust, does not render it incompetent. When such photograph is properly authenticated as a correct portrayal of conditions observed and related by the witness who uses it to illustrate his testimony, it is admissible for that [illegible]

State v. Atkinson, 275 N.C. 288, 167 S.E.2d 241 (1969); State v. Porth, 269 N.C. 329, 153 S.E.2d 10 (1967). The photograph having been used in accordance with the rule, defendant's fourth assignment is without merit and is overruled.

Defendant's fifth, sixth and seventh assignments of error are addressed to evidence concerning gunshot wipings and the gunshot residue test based thereon. The fifth assignment presents the question whether SBI Agent Sampson, who secured the wipings, was qualified to take them.

Lee Edward Sampson, a Special Agent with the State Bureau of Investigation, took gunshot wipings from defendant's hands during the early morning hours of 8 March 1973. This agent testified that in taking the wipings he used the kit supplied by the SBI Chemical Laboratory and followed the instructions and the procedures contained in that kit.

[15] The record shows that Agent Sampson had two years of college training, had worked for the Federal Bureau of Investigation in its Fingerprint Identification Division for one year and had been an agent with the State Bureau of Investigation for two years and five months at the time he took the wipings. He had been personally instructed in the procedure to be followed by E. D. Cone, the SBI chemist who wrote the instructions contained in all gunshot residue wiping kits used by the SBI.

The procedure for taking the wipings is not "highly technical" as defendant contends. It is a relatively simple matter to follow the instructions, take the wipings, and turn them over to a qualified chemist for analysis and testing. That is all Agent Sampson did, and he was qualified by training and experience to perform that simple task. His background in technical police investigatory work and his personal instruction by a chemist who was expert in the field of gunshot residue tests insured the exercise on Agent Sampson's part of the utmost care in taking the wipings. [illegible] fendant's fifth assignment is without m[illegible]

Defendant's sixth assignment asserts error by the court in accepting into evid[illegible] an instruction sheet contained in a gun[illegible] wiping kit without evidence that it was fact the same sheet used by Agent Sa[illegible] son in taking the wipings from defend[illegible] hands. R. D. Cone, a forensic chemist [illegible] the SBI Chemical Laboratory with a Bac[illegible] elor of Science Degree from North Caro[illegible] na State University and a Master of Sc[illegible] ence Degree from Michigan State Uni[illegible] sity, and with fifty semester hours [illegible] chemistry with major emphasis of study [illegible] the area of microbiology and biochemis[illegible] testified that he authored the instructio[illegible] placed in all SBI gunshot residue wip[illegible] kits. After outlining the procedure fo[illegible] lowed in taking a wiping, he identified [illegible] document as an accurate copy of the in[illegible] structions contained in the kits. Then, ov[illegible] objection, he read the instructions to th[illegible] jury. Defendant contends there was n[illegible] evidence that it was the same instructio[illegible] sheet used by Agent Sampson in taking th[illegible] wipings and, under the best evidence rul[illegible] it was error to allow its introduction in[illegible] evidence.

The instructions, in pertinent part, read as follows:

"Instructions for collecting gunshot residue. North Carolina State Bureau of Investigation, Raleigh, North Carolina. The following procedure should be used to swab surfaces suspected of containing gunshot residue with the kit supplied by the North Carolina State Bureau of Investigation Chemical Laboratory.

Number 1. Thoroughly wash your hands with soap and water and dry them with a clean towel prior to doing the wiping for gunshot residue.

Number 2. Remove one of the cotton swabs from the plastic zip-lock bag and moisten it with four drops of two percent hydrochloric acid.

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ydrochloric acid.

Number 3. Use the moistened swab and thoroughly swab the back of the left hand including the back of the fingers.

Number 4. Place the used swab into one of the clean zip-lock plastic bags. Seal the bag and label it in the following manner; a. Location of wiping (left back, right palm, etc.) b. Name of suspect. c. Date of wiping. d. Your identification mark.

Number 5. Using three additional swabs, moisten each one individually as in Step 2 and swab the left palm, right back, and right palm, respectively as in Step 3. These swabs should be placed in separate zip-lock bags and treated as in Step 4.

Note: If at any time during the wiping procedure the hand of the wiper should come in contact with the cotton end of the swab or the suspect's hands, the hands should be thoroughly washed in soap and water before the next swab is used. In cases where the same person is wiping the hands of more than one suspect, it is necessary to wash your hands between doing each person.

Number 6. Moisten one of the swabs with four drops of two percent hydrochloric acid and immediately place it in a separate zip-lock plastic bag. This bag should be labeled 'control' as the swab will be analyzed to determine the purity of the materials used to collect the gunshot residue.

Number 7. Swab the inside of the cartridge casing (if available) with a cotton swab moistened with four drops of two percent hydrochloric acid and handle it as in Step 4. This step is particularly important since some types of ammunition do not contain antimony in their primer.

Note: It is advisable not to handle the cartridge casing until the other wipings have been completed. And there is an asterisk for the footnote below this.

When weapons and/or fired cartridge casings are being submitted to the firearms laboratory, do not follow Step 7. In these cases, the chemical laboratory will make a cartridge case wiping in the firearms laboratory. Indicate on the evidence sheet when this evidence has been submitted to the firearms laboratory.

Item Number 8. Fill out the attached evidence sheets completely and enclose them in the mailing envelope with the wipings. The information on these sheets should include the type of weapon involved, the caliber and manufacturer of the ammunition, the condition of the weapon, and the amount of time elapsed between the firing of the weapon and the wiping of the suspect's hands.

Nine. Seal all of the plastic bags used in the self-addressed envelope and mail them by first class mail. The envelope should be marked on the outside 'Attention Chemical Laboratory—Gunshot Residue.'

Number 10. An official report will be mailed to the requesting officer within a reasonable period of time. If rush results are needed, this should be indicated by a personal telephone call to the chemical laboratory."

[16] The procedure Agent Sampson testified he followed in taking the wipings and the procedure contained in the instruction sheet read to the jury by SBI Chemist Cone are essentially the same. Under these circumstances we need not decide whether defendant's technical objection to the introduction of the instruction sheet is sound. The record clearly demonstrates that defendant was not prejudiced in the slightest by the introduction of the instructions sheet into evidence and for that reason his sixth assignment of error is overruled.

Defendant contends that scientific tests conducted on gunshot residue wipings are speculative and highly unreliable and that the court erred in allowing R. D. Cone to

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on the subject's hands.

crucial concern with tests of this
e is the test could indicate that a
has fired a handgun when in fact
did not. It was for this reason that
courts rejected the dermal nitrate
(GSR) test. *See* Brooks v. People, 139
368, 339 P.2d 937 (1959); Hoos v.
197 N.M. 921 (Okl. Cr. 1961), cert.
d, 369 U.S. 1, 82 S.Ct. 719, 13 L.
2d 701 (1962); Clarke v. State, 218
259, 332 S.W.2d 793, cert. denied,
U.S. 942, 80 S.Ct. 363, 17 L.Ed.2d 222
). This test proved unreliable be-
it could not distinguish between ni-
s deposited on the hand from the fir-
of a handgun and nitrates deposited on
hands of persons who had come in con-
with such common substances as ex-
ves, fireworks, fertilizers, pharmaceu-
s, leguminous plants (peas, beans al-
), and burning tobacco products such
igarettes. 5 Am.Jur. Proof of Facts,
arms Identification 119, 20 (1960). Ap-
ently because of this fact, participating
erts in the 1963 seminar on the scien-
aspects of police work conducted by
International Criminal Police unani-

mously rejected the dermal nitrate test as being without value. Moenssens, Moses and Inbeau, Scientific Evidence in Criminal Cases § 4.12 (1973).

[17] According to the testimony of Mr. Cone, antimony, barium and lead will in "rare circumstances" be found on the hands of persons who have not fired a handgun. Even so, by reason of the location and the level of the concentrations of the test elements on the subject's hands he is able to determine the probability, great or small as the case may be, whether the test substances come from the discharge residues of a handgun or from some other source. In our view, the test employed by Mr. Cone in this case avoids the pitfalls inherent in the dermal nitrate test and demonstrably possesses the degree of reliability required to render it competent. We hold that evidence of the results of the test was properly admitted. The mere fact that such evidence does not exclude every remote possibility of error does not render it incompetent. Moreover, defendant has not been prejudiced by the introduction of the results of the gunshot residue test since an eyewitness to the shooting testified that defendant fired a pistol pointed at the victim's face. Defendant's seventh assignment of error is overruled.

Assignments of error 8, 9, 10 and 11 are based on exceptions to the trial judge's charge to the jury. Defendant asserts in these assignments: (1) that the court violated G.S. § 1-180 when it characterized as "boresome" the recapitulation of the evidence; (2) that the court erred in defining deliberation and erroneously instructed with respect to proof thereof; (3) that the charge on the elements of first degree murder was erroneous and confusing; and (4) that the court erroneously invaded the province of the jury in that portion of the charge dealing with the jury's deliberations.

These assignments require no discussion and are overruled. Their total lack of merit is revealed by careful examination of the entire charge.

Defendant contends the death penalty imposed in this case is legally unauthorized and constitutes a cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments to the Constitution of the United States. This constitutes his twelfth and final assignment of error.

In an excellent brief, similar in many respects to the *amicus curiae* brief filed by the NAACP Legal and Educational Fund, Inc., in State v. Jarrette, N.C., 202 S.E.2d 721 (1974), we are urged to reconsider our decision in State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973), and hold that life imprisonment is the sole penalty for the four previously capital crimes in this State —murder, arson, burglary and rape—until the Legislature acts to revise the present statutes dealing with those crimes.

[18] All arguments here, attacking the soundness of our decision in *Waddell* and urging the unconstitutionality of the death penalty under the Eighth and Fourteenth Amendments, were fully considered in State v. Jarrette, supra. Our decision in *Jarrette* reaffirms the holding in *Waddell* and is controlling here. In this jurisdiction the penalty for murder in the first degree committed after 18 January 1973 is death. That penalty is neither cruel nor inhuman in a constitutional sense. Defendant's twelfth assignment of error is overruled.

All the evidence tends to show a senseless, vicious, calculated murder without mitigating circumstances. Having received a fair trial free from prejudicial error, the verdict and judgment must be upheld.

No error.

BOBBITT, C. J., and HIGGINS and SHARP, JJ., dissent as to death sentence and vote to remand for imposition of a sentence of life imprisonment for the reasons stated in the dissenting opinion of Chief Justice Bobbitt in State v. Jarrette, N.C., 202 S.E.2d 721 (1974).